

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM A. ALLEN,

Defendant-Appellant.

UNPUBLISHED

January 12, 1999

No. 198417

Recorder's Court

LC No. 95-012669 FY

ON REHEARING

Before: Hood, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of four counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant received four concurrent ten to fifteen-year terms of imprisonment for his assault convictions and a consecutive two-year term of imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

The case was dismissed without prejudice on defendant's motion when one of the prosecution's witnesses failed to appear. An hour later, the witness appeared, the dismissal was vacated, and trial proceeded.

On the instant record, the prosecutor took no action to discontinue or abandon the prosecution. MCL 767.29; MSA 28.969; *People v McCartney*, 72 Mich App 580, 585; 250 NW2d 135 (1976). Instead, the dismissal was entered on defendant's motion without concurrence by the prosecutor. Accordingly, the factual predicate for defendant's claimed error, that being the prosecutor's seeking and securing an order of nolle prosequi, is not present in the record. Moreover, defendant has failed to argue under the circumstances presented in this case that the trial court lacked the authority to revisit its ruling and vacate its order of dismissal within an hour of its entry. Under these circumstances, defendant's claimed error must fail.

Defendant next contends that he was denied the effective assistance of counsel at trial because his appointed attorney did not investigate and present an intoxication defense and met with defendant on only one occasion the night before trial. In connection with his motion, defendant presented affidavits

from various witnesses stating that they had seen defendant intoxicated some time before the events giving rise to the charges.

A *Ginther*¹ hearing was held at which defendant and his attorney testified. The evidence presented at the hearing demonstrated that the choice not to pursue an intoxication defense was a strategic decision made by defense counsel on the basis of the evidence to be presented at trial. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). It is well established that this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Moreover, the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). As the trial court noted, defendant's vivid recollection of details relating to the events occurring that night would have belied any claim that he was too drunk to have formed the specific intent to kill and presentation of an intoxication defense would have undermined the defense theory that someone else was the gunman. Thus, defendant has failed to overcome the presumption that counsel provided effective assistance. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US 1121 (1995).

Affirmed.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).